No. 12,509

IN THE

United States Court of Appeals

For the Ninth Circuit

THOMAS E. HAYES, et al., on Behalf of Himself and All Others Similarly Situated,

Appellants,

vs.

UNION PACIFIC RAILROAD CO. (a corporation) and DINING CAR EMPLOYEES UNION LOCAL 372 (a voluntary unincorporated labor organization); and JAMES G. BARKDOLL, as District Director of said Local 372 in the District of Los Angeles, State of California,

Appellees.

CLOSING BRIEF FOR APPELLANTS.

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CLOSING BRIEF FOR APPELLANTS.

INTRODUCTION.

There have been filed in this case a brief for appellee Dining Car Employees Union Local 372 (hereinafter referred to simply as "Union") and also one for appellee Union Pacific Railroad Company (here-

inafter referred to simply as "Railroad"). The first major portion of this closing brief for appellants will deal primarily with the positions advanced by Railroad. In many respects the reply to Railroad will also be a reply to Union, but where this is not the case a specific reply will be made to the latter. We shall not repeat arguments already made in our opening brief but where specific reference to any argument made in that brief is required for the sake of emphasis or otherwise, reference will be to designated pages, sections or paragraphs of the brief.

COMMENTS ON RAILROAD'S STATEMENT OF THE CASE.

(A) Motions involved.

We agree that when the Court below dismissed the complaint and refused to permit the filing of the amended complaint on the ground of lack of jurisdiction, the Court meant that it lacked jurisdiction of the subject matter of the action since it was, in its opinion, not a civil action arising under any act of Congress regulating commerce, and specifically did not arise under the Railway Labor Act. It is said in Railroad's brief (page 2) that "On motion of the appellees the District Court dismissed the original complaint for lack of jurisdiction and also for failure to state a claim upon which relief could be claimed. In passing upon the latter ground the Court considered the affidavits presented by all parties and determined that there was no genuine issue as to any material fact."

The only document bearing upon this situation which the Court itself prepared is its opinion and order. (Tr. 136-144.) In this opinion there is not one single reference to the affidavits nor is there any discussion of whether or not a genuine issue existed as to any material fact. On the contrary, the opinion says:

> "At most the complaint, in its original and amended form, alleges a violation of provisions of the Agreement. Any right of action, if one exists, is based on the alleged breach of the Agreement and does not arise under the Railway Labor Act, but only from the consequent contractual relations of the parties. (Citing cases.) Since this is not an action arising out of any act of Congress regulating commerce, the Court has no jurisdiction under 28 U.S.C. § 1337. Nor have the petitioners alleged facts facts necessary to give the Court Jurisdiction under the diversity of citizenship provision, 28 U.S.C. § 1332. *The question of jurisdiction* being decisive, it is not necessary to consider the other motions and respondents' motion to dismiss the action must be granted. It is so ordered." (Emphasis added.)

There was no consideration whatsoever by the Court of the question whether or not a genuine issue as to any material fact existed and consequently the order dismissing the complaint cannot be considered as a summary judgment in favor of Railroad and Union. (F.C.R. 56 (c).)

(B) Factual background.

Under this heading Railroad insists, notwithstanding the record, that the Court considered and passed upon the facts disclosed by the affidavits. In view of the fact that the Court based its order solely upon the jurisdictional issue to be determined and which it determined exclusively in the light of the complaint and proposed amended complaint, we did not in our designation of record include any of the affidavits, whether submitted by the appellants or by Railroad and Union. They were no part of the record necessary to a determination by this Court of the correctness of the ruling of the Court below. Furthermore, as will shortly be shown, the affidavits submitted by Railroad and Union contained so many demonstrably false statements of fact and so much misleading statistical material that we considered them of little value. Reference, however, will be made to these affidavits for the purpose of demonstrating their misleading character.

The analysis of the material provisions of the agreement concerning seniority (Railroad Br. pp. 2, 3, 4 and 5 lines on p. 5) are substantially correct but the conclusions drawn from this analysis are directly opposed to the allegations of the complaint. It is alleged in both the complaint and the proposed amended complaint that every one of the appellants was, solely because he was a negro and not for any other reason or consideration involving skill, capacity or experience, when first employed assigned arbitrarily a seniority date in Group B, whereas white persons when first employed in comparable positions were arbitrarily and

without consideration of anything but the fact that they were white, assigned seniority dates in Group A. *This allegation has never been contradicted* in any affidavit submitted on behalf of Railroad or Union, although attempts have been made to mislead the Court into thinking that there was no discrimination practiced against the negro appellants at the time of their initial employment.

The affidavit of Steven R. Auguston, verified September 14, 1949 (Tr. 25-29) at page 28 of the transcript alleges as follows:

> "At all times mentioned in the complaint the promotion and assignment of employees to positions in higher seniority groups has been governed by said agreement regardless of race. It is false and untrue that plaintiff and other negroes have been assigned to seniority Group B and the third seniority class and to lower seniority groups and classes, and have been denied seniority in Group A and in the first and second seniority classes."

Attached to this affidavit is an exhibit purporting to give the name, position and Group A seniority date of the appellants. (Tr. 30-32.) The affidavit infers that the Group A seniority date, although it does not so state, was accorded to the plaintiffs at the time of their initial employment. Furthermore, the statement is made in the same affidavit (Tr. 28) that seniority dates on the Group A roster run back as far as the year 1916, the specific implication being that seniority dates acquired in the year 1916 were acquired when

the individuals were first employed. The implication is false and the seniority dates shown in Exhibit A were not acquired when the individuals were first employed.

This can easily be established by reference to the seniority roster dated January 1, 1948, relied upon in Exhibit (A) attached to the affidavit of H. A. Hansen, verified November 12, 1949. (Tr.-Affidavit pp. 111-127; Ex. A pp. 127-135.)

We turn now to Exhibit A attached to the Auguston affidavit. (Tr. p. 30.) The following names have been checked from the seniority register for the Omaha district dated January 1, 1948 and we shall follow the tabulation contained in Exhibit A, except we shall add two more columns, one disclosing the date of original employment, the other disclosing the group in which seniority was originally assigned. This important additional material was not furnished to the Court in Exhibit A.

Name	Original Employment	Original Seniority Group	Group A Seniority Dates
John Bukey	2/ 7/18	B	4/12/49[1]
Richard Buntin	8/ 9/44	B	6/ 2/46
Henry Burnett	7/26/42	B	None obtained
Willie R. Burton	12/ 9/45	B	8/24/46
M. J. Clayton	7/12/39	B	6/ 2/46
Tom D. Clerkley	6/30/44	B	6/ 2/46
Robert M. Ewing	8/ 1/35	B	9/ 1/47
Langston Gardner	7/11/44	B	6/ 2/46
Edward W. Hamilton	7/ 9/41	B	6/ 2/46
Luther W. Jackson	1/17/43	B	1/23/45
Edward M. Jones	8/15/16	B	6/ 2/46[2]
Theodore R. Jones	7/18/35	B	6/ 2/46
Henry O. Jury	9/29/42	B	6/ 2/46
L. A. King	5/13/45	B	6/13/46
Walter M. Moore	3/30/43	B	4/20/45
Belford M. Moses	7/ 3/39	B	6/ 2/46
Oliver E. Odom	7/ 7/39	B	6/ 2/46
Charles M. Renfro	6/19/41	B	6/ 2/46
Benjamin Robinson	9/ 1/37	B	6/ 2/46
Harvey H. Robinson	7/30/41	B	6/ 2/46
John J. Shanks	1/25/45	B	6/ 2/46
Spencer L. French	3/12/28	B	None obtained
Charles A. Smith	7/ 6/42	B	6/ 2/46
Thomas R. Spikes	6/15/42	B	6/ 2/46
Vernell Thompson	1/ 1/46	B	8/ 1/46
Charles Winston	6/25/41	B	6/ 2/46

[1]See discussion of this case, affidavit of Thomas E. Hayes, verified October 15, 1949 (Tr. 60-78) at pages 65 to 67.

[2]See discussion of this case, affidavit of Thomas E. Hayes, verified October 15, 1949 (Tr. 60-78) at pages 66 and 67.

It thus appears that with regard at least to the individuals just above enumerated the evidence is conclusive that they were initially hired and assigned a seniority date in Group B merely because they were negroes, and not until much later did they ever get a seniority date in Group A. The lapse of time be-

tween the date of initial hiring and automatic assignment to Group B on the one hand, and the date when seniority was accorded in Group A shows conclusively that when first employed these individuals obtained no Group A seniority but were relegated to Group B and merely because they were negroes.

These facts are enough to discredit the Auguston affidavit (Tr. 25-32) but the affidavit and the falsity of its maker is thoroughly emphasized by the following circumstances. The affidavit concludes with this statement: "Neither plaintiff nor any other person at any time mentioned in the complaint called such alleged act of discrimination to the attention of defendant Union or made any request that defendant Union take action in respect thereto." (Tr. 29.) In the Hayes affidavit, verified October 15, 1949 (Tr. 60-78) at page 71, detailed correspondence between Hayes and Auguston concerning the issue is set forth. In the affidavit of Hansen, verified October 21, 1949 (Tr. 80-91) at pages 84 and 85, it is admitted that one at least of the letters referred to in the Hayes affidavit actually exists, for the letter is in part set forth in the affidavit. In fact the text of the letter is quoted in part in Railroad's brief. (Br. p. 8.)

Therefore, the statement in the Auguston affidavit that no complaint had ever been made to the Union or any of its officers can be nothing less than a deliberate and a conscious falsehood. The Auguston affidavit is unworthy of any belief whatsoever. Incidentally, Railroad has never repudiated Auguston or this particular affidavit. In fact, Hansen attempted to

correct certain "minor and inconsequential errors." (Tr. 91.) The truth of the matter is that all of the affidavits submitted were designed to mislead the Court into thinking that many if not all of the appellants actually acquired seniority dates in Group A at the time of initial hiring.

The Hansen affidavits are equally unreliable. In an affidavit verified by Hansen October 21, 1949 (Tr. 80-91) at page 88 he states that "Mr. Hayes was discharged from the service of the defendant Railroad Company as a chef in 1937 because he had falsified his age in making application for his original employment and when he was rehired in 1942 he was hired as a Group B second cook which was the only work available at the time."

In an affidavit verified by Hayes October 31, 1949 (Tr. 102-109) at pages 106 to 108, Hayes gives a complete history of his employment and the real reason why he was discharged, and he states categorically that he made no representation as to his age.

The only reply which Hansen made is contained in his affidavit verified November 12, 1949 (Tr. 111-127) at page 124, in which he states: "There is no basis or foundation in fact for Mr. Hayes' assertion in this regard, and he was, as I stated in my affidavit, discharged from the defendant's employ in 1936 because he had falsified his age in his employment application." The affidavits submitted by Railroad and Union were, it is suggested, prepared upon the time-honored theory that all a white man needs to do when an issue

of veracity arises between him and a negro, is to say, "It isn't so."

Another illustration of Hansen's reckless use of affidavits has to do with Hansen's knowledge of his own employment records.

There were filed in this proceeding certain objections to interrogatories propounded to Railroad by appellants. These objections were supported by an affidavit verified by Hansen August 26, 1949. This affidavit is not in the transcript because neither side thought it necessary in the making of a record requisite for the determination of the issues raised in this case. But the affidavit itself is referred to in various parts of the transcript. The affidavit in question stated that "Horace Burnett, Leadis Kettor, William B. Regen, Leonard D. Riuers, John J. Shanks, and Pall E. Woods have never been employed by the Union Pacific Railroad Company in the cook's craft or in its dining car service, and that although diligent search has been made no record of any employment in the dining car service of the Union Pacific Railroad Company of said above-named persons has been found."

When this situation was brought to the attention of Hayes, he made an affidavit verified October 15, 1949 (Tr. 60-78) wherein at page 62 he gave specific information as to the exact locations where the individuals in question were working.

In reply to this affidavit Hansen in an affidavit verified October 21, 1949 (Tr. 80-91) at page 83, was finally forced to admit that John J. Shanks, one of the

individuals whom he said had never been employed by Railroad in any capacity, was and is employed in the dining car department.

The Hansen affidavits, therefore, are clearly wholly unreliable. Their only purpose was to defeat the allegation of the original complaint that the negroes, solely because they were negroes, were precluded from asserting seniority in higher groups and classes. But, as will appear later, we are not relying upon that allegation at the present time as related to all of the appellants.

Another subsidiary purpose of the Hansen affidavits was to refute the contention of the appellants that negroes were, when first employed, assigned seniority dates in Group B arbitrarily and automatically because they were negroes, whereas whites similarly employed were assigned seniority dates in Group A. It may be that as a result of the struggle for the abolition of the vicious discriminatory practices indulged in by Railroad against its negro employees that certain procedures have been abolished and that some negroes belatedly have been accorded rights which had previously been denied.

The fact remains, however, that every one of the appellant cooks was, when initially hired, assigned automatically to seniority Group B and no amount of evidence which establishes that this general practice may have been abandoned can eliminate the fact that the appellant cooks in this case were hired when the practice was in full force, and that they have been the victims of it ever since.

Counsel for Railroad calls particular attention to the fact that "The Union which represents and admits to membership both colored and white employees has not asked Railroad to change the seniority provision of the agreement to carry out the desires of the group represented by appellant Hayes." (Br. p. 8.) Evidently he attributes considerable significance to this circumstance. He is right. The circumstance is significant and the significance is that Union is under the domination of Railroad, is discriminating against the negroes whom it represents, and to all intents and purposes is a company union. It has, through the collective bargaining process, penalized some of those whom it purports to represent and it has done so in the interests of its white membership in the Union. Without this cooperation Railroad would never have dared to enforce its discrimination policies against negroes.

(C) Issues involved.

When the complaint was first prepared counsel had no personal knowledge of the facts, all of which was gained by long distance correspondence between Mr. Bromsen in New York and Mr. Hayes in Omaha. Many of the men involved did not know their own seniority ratings because Railroad never publishes the seniority list for the new year in January of each year, as the contract requires, but on the contrary delays the publication for many months. Many of the men did not know that they had been given any seniority status in Group A because that fact had made no difference in their pay or emoluments as it was impos-

sible for them to overcome in bidding on any jobs the initial discrimination imposed upon them when they were first hired, that is, relegating them to seniority dates in Group B.

As a result of the difficulties of communication and of gaining a thorough understanding of the facts, the complaint as first prepared contained misstatements of fact which, as soon as the true facts were developed, were corrected in the proposed amended complaint.

The issues were, we think, very clearly stated in our opening brief (Br. p. 12) and the questions of law involved were stated with equal clarity in that same brief (Br. p. 13) and we shall not enlarge upon what has been previously stated.

In other words, as soon as it was ascertained that some of the allegations of fact in the original complaint were not true we admittedly took the steps to correct the situation by seeking to file the amended complaint. The purpose of the amended complaint is clearly outlined in our opening brief. (Br. pp. 9-13.)

The next main topic for discussion is Railroad's argument. We do not feel it necessary to deal specifically with Railroad's summary of argument because whatever might be said with respect to the summary is equally applicable to the argument itself. We proceed, therefore, immediately to a discussion of the first point made by Railroad under the head of argument and it is

I.

AN ACTION FOR A BREACH OF CONTRACT DOES NOT PRESENT A FEDERAL QUESTION.

With this principle of law we are in complete accord, and the cases cited by Railroad substantiate its position. Never at any time have we taken the position that the instant case involved a breach of contract. The distinction between cases involving merely a breach of contract and the case at bar is well illustrated by the cases cited by Railroad in support of its axiomatic position. Take the following case:

> *Starke v. N.Y.C. & St. Louis R.R. Co.,* 17 Labor Cases, par. 65,629.

This case arose in the United States Court of Appeals for the Seventh Circuit on appeal from the District Court for the Northern District of Illinois. The gist of plaintiff's cause of action was that the defendant Railroad improperly placed plaintiff in a seniority position below that of two other machinists whose accumulated seniority was less than that of plaintiff. In this case the plaintiff relied upon

> *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen,* 323 U.S. 210,

and what is substantially a companion case,

> *Graham v. Brotherhood of Locomotive Firemen & Enginemen,* 338 U.S. 232.

In discussing these cases the Court said:

> "In these cases, as will be noted, the suits were against both the carrier and the Brotherhood as the bargaining agent for the employees and, in short, rested upon the premise that the agree-

> ments made were discriminatory and in violation of the plaintiff's statutory and constitutional rights. As the Court in the *Tunstall* case stated (page 213): 'It is the Federal statute which condemns as unlawful the Brotherhood's conduct.' In contrast, there is no contention here that the agreement relied upon is condemned by the statute, but on the other hand it concededly is in conformity therewith.' ''

This case (the *Starke* case) illustrates very clearly the difference between the breach of contract cases cited under Railroad's Point I of argument and the case presented by this appeal. In the *Starke* case there was no discrimination alleged and the collective bargaining agent was not even joined as a defendant whereas in the case at bar a discriminatory conduct and practice is clearly alleged and both Railroad and the collective bargaining agent are sued.

It would be bootless to examine the rest of the cases cited by Railroad in its brief at page 17 because every one of them involves merely a breach of contract and in none of them is the collective bargaining agent joined except in the case of *Malone v. Gardner,* 62 F. (2d) 15, where the complaint charged a conspiracy between the collective bargaining agent and Railroad to violate a collective bargaining agreement. In short, in none of these cases was there any issue of discrimination solely on the ground of race, which is the vice condemned by the Supreme Court of the United States in the *Steele* case, 323 U.S. 192, 89 L. Ed. 173, and the *Tunstall* case, 323 U.S. 210, 89 L. Ed. 187.

II.

RAILWAY LABOR ACT DOES NOT PROHIBIT RACIAL DISCRIMINATION BY RAILROADS.

This statement is literally true but it does not advance the argument or the understanding of the issues in this case. We have no quarrel with any of the cases cited by Railroad in support of its position. (Br. pages 18 and 19.) We do, however, take issue with Railroad's effort under this head of argument to distinguish and whittle down the *Tunstall* and *Steele* cases, supra.

In the first place, let it be understood that we have never taken the position that the Railway Labor Act either expressly or impliedly forbids discrimination against negroes either at the time of first employment or in their treatment thereafter. We do contend, however, that when the discrimination arises out of and is perpetuated through the collective bargaining process such discrimination has met the condemnation of the Supreme Court in the *Steele* and *Tunstall* cases.

In these cases, even though the question was not directly involved, it is nevertheless true that the original bargaining agreements under which negro firemen acquired seniority of which they were subsequently deprived, classified them as non-promotable and white firemen as promotable. The only basis for the discrimination was clearly that of color and there is no question but that any such agreement in the making of which the Railroad and collective bargaining agent

participated is a direct violation of the principles laid down in the *Steele* and *Tunstall* cases. At a slightly later point in this case we shall have more to say about these two cases.

III.

CAUSES OF ACTION AGAINST THE RAILROAD AND UNION ARE SEPARATE AND DISTINCT.

This is evidently a straw man set up by Railroad for the purpose of demolishing it. If the situation contended for by Railroad were actually true, that is, if there were two separate causes of action, one against Union and one against Railroad, the conclusion drawn by Railroad might be plausible, but the fact of the matter is that the gist of both the original complaint and the proposed amended complaint is that the discrimination of which complaint is made came about through the collective bargaining process, and if it did the case at bar falls squarely within the principle of the *Steele* and *Tunstall* cases, *supra.*

Under this heading there is some discussion of the meaning of the word "connivance". This subject matter, however, has been fully covered in our opening brief (Br., Point IV, pages 29-31) and we shall not repeat what was said there.

IV.

FACTS DISCLOSED BY THE AFFIDAVIT SHOW COURT IS WITHOUT JURISDICTION.

The point here made is that the affidavits fail to show discrimination. The affidavits are in hopeless conflict but nevertheless our analysis of the seniority history of twenty-six of the appellants herein (*supra,* page 7), shows conclusively the existence in their case of discrimination at the time of initial hiring, in that they were relegated to a seniority date in Class B solely because they were negroes, and, not until after the lapse of considerable time, in one case thirty years, were they ever able to obtain a seniority date in Group A. The affidavits submitted by Railroad and Union have been cleverly devised so as to befog the issue but they do not succeed in contradicting the situation in the case of the twenty-six individuals referred to above.

The analysis was based upon the seniority roster of the Omaha District for the year 1948. Inasmuch as we do not have access to the seniority roster in other districts nor to the system seniority roster we are not able to include in the analysis the seniority history of all of the appellants. We submit, however, that the statistical matter which we have adduced with respect to the twenty-six individuals above referred to is sufficient to establish our point.

While it is true that the Court always has power to conduct an individual inquiry to determine whether or not it has jurisdiction and while it can use affidavits for this purpose, it does not customarily resort to

affidavits which are hopelessly in conflict. In *American Insurance Company v. Bradley Mining Company,* 57 F. Supp. 545, cited by Railroad, the facts developed by the affidavits were not in dispute. On the other hand the better practice seems to be that outlined in *Borden's Farm Products Company v. Baldwin,* 293 U.S. 194, 79 L. Ed. 281, in which the Court said:

> "But the case is not before us upon evidence or upon allegations of fact based on evidence as *the complaint was dismissed solely in the view that it failed to state a cause of action and the motion for injunction accordingly fell with findings being made.* As we have said, we may read the complaint in the light of facts of which we may take judicial notice but if so read it may be regarded as sufficient. The decision of this appeal should not turn on other facts which are the proper subjects of evidence and of determinations of fact by the trial court."

No matter how much Railroad may try to disguise the fact, the Court below, as can clearly be seen from a consideration of its opinion, was not at all influenced by nor did it consider the affidavits in reaching the conclusion that it did.

At the risk of boresome repetition we call the attention of the Court to the following language. In that opinion all it did was to analyze the complaint and the proposed amended complaint, after which it made the following statement: "The question of jurisdiction being decisive, it is not necessary to consider the

other motions, and respondent's motion to dismiss the action must be granted. It is so ordered." (Tr. 143-144.)

V.

THE JUDGMENT OF DISMISSAL WAS PROPER SUMMARY JUDGMENT FOR APPELLEES.

The vice of this point of Railroad's argument lies in the fact that it is predicated upon the fact that the judgment of dismissal was proper in the light of the affidavits. There was no finding by the Court below that the affidavits did not create an issue as to any material fact and without such finding the judgment of dismissal cannot be considered as a summary judgment by Railroad and Union.

VI.

RAILWAY ADJUSTMENT BOARD HAS EXCLUSIVE JURISDICTION OF THIS CONTROVERSY.

This point of argument is based exclusively on the decision in the case of *Slocum v. D. L. & W. R. Co.*, 339 U. S. 239, 94 L. Ed. 534, but even counsel for Railroad admit (R.R. Br. page 32) that the *Slocum* case does not overrule the *Steele* or *Tunstall* cases and that the *Slocum* case does not have application in a situation where the *Steele* and *Tunstall* cases apply.

Moreover there is in the *Steele* case a specific holding that the plaintiffs were not required to exhaust

the administrative processes by applying to the Railway Adjustment Board because the Court was not able to find that a hearing before either of these tribunals, constituted as they were by individuals who had already prejudged the issue, would constitute an adequate administrative remedy. (323 U.S., page 206, 89 L. Ed., page 185.)

VII.

THE COURT PROPERLY DENIED LEAVE TO FILE AMENDED COMPLAINT BECAUSE IT IS A SHAM.

The situation at the time it was sought to file the amended complaint was as follows: Argument had been had upon the motion to dismiss the original complaint and during the course of that argument counsel for appellants told the Court that if its ruling should be adverse to appellants, counsel would like the opportunity to amend the complaint so as to present the issue in the strongest possible form to the Appellate Court and the Court assured counsel that he would have the opportunity to prepare the strongest pleading compatible with the facts. What counsel was trying to avoid was a fruitless appeal in which an adverse decision might be rendered on a technicality which might be eliminated by amendment.

In whatever way it is attempted to disguise the facts in the case at bar, whether by affidavit or by argument, it is not and cannot be contradicted that twenty-six at least of the appellants were, at the time they were initially hired, relegated to seniority in

Group B solely because they were negroes. Now, how did this come about? It was an established practice of Railroad, just as it was an established practice of the southern roads, to classify negroes as non-promotable, as shown by the *Steele* and *Tunstall* cases. This was the situation which existed when the collective bargaining agreement in the case at bar was argued by Railroad and Union, effective June 1, 1942. That agreement was executed in the light of the discriminatory practice and the only reason why the agreement retained the group and class seniority classifications was to perpetuate the discriminatory practice against the negroes. It is obvious, therefore, that as a result of the collective bargaining process the new contract of June 1, 1942 recognized the existing discriminatory practice because it was agreed by Railroad and Union that the contract should be interpreted in the light of that practice.

Suppose the new contract had stated in explicit terms, after having set up the group and class seniority provisions, that negro cooks when first employed shall be given seniority dates in Group B only because they are negro and white cooks similarly employed shall be given seniority dates in Group A because they are white. Could there be any possible doubt that the collective bargaining agent had grossly betrayed its trust and used the collective bargaining process for the purpose of discriminating against the negroes it was supposed to represent?

Now, we have no express contract to that effect and the reason we haven't, is that in the light of the *Steele*

and *Tunstall* cases it would be stupid to write a contract which would immediately be stricken down by the courts.

But discrimination is an exceedingly subtle thing and it takes many forms, many of which are very difficult to trace in practice. But it is submitted that this Court cannot close its eyes to the realities of the situation and cannot fail to recognize the role that the collective bargaining process played in the case at bar in perpetuating the discriminatory practice.

Now if it be sham to attempt to get the true situation before the Court by an amended pleading, then any amendment can be characterized as sham. There is no bad faith here but only an honest effort on the part of counsel to present the case to the Court in the strongest possible light.

VIII.

PROPOSED AMENDED COMPLAINT DID NOT STATE CLAIM UPON WHICH RELIEF COULD BE GRANTED.

The gist of this argument is that a complaint which failed to allege that Railroad has assigned all negroes hired by it to lower seniority groups and classes when first employed, fails to state a cause of racial discrimination. This contention is obviously without merit. Each of the appellants is interested in his particular condition and in that of any other negro who finds himself in a similar condition. If there is discrimination against these appellants and if the

case at bar falls within the principle of the *Steele* and *Tunstall* cases, *supra,* these appellants are entitled to relief.

Take, for example, the *Tunstall* case, *supra.* It appears that the only recovery in this case was $1,000 for Tunstall. *(Brotherhood of Locomotive Firemen v. Tunstall,* 163 F. (2d) 289, 291.) The litigation, therefore, apparently involved only one engineer and there is no record of any engineer other than Tunstall participating in any recovery.

The people discriminated against are the ones who have the cause of action and also we think there has been discrimination against others of the same class. If discrimination against the particular litigant can be established it is immaterial that it does or does not exist presently in the case of other negroes.

The second ground upon which Railroad relies is that the verbal understanding violated the Statute of Frauds and it cites the California Civil Code, paragraph 1624. (R.R. Br. 38.) What the California Code has to do with the situation is beyond our understanding. There is no allegation that the verbal notification took place in California and the California statute has no application.

It is also urged that the verbal understanding violates the parol evidence rule but there is no reason why a written agreement may not be modified by an executed subsequent oral agreement.

The straws upon which Railroad is here leaning demonstrate the weakness of its case. It is novel doc-

trine that parties can excuse themselves from a violation of positive obligations cast upon them by law, by recourse to the contention that the violation is based upon a contract that is not enforceable. It may not be legally enforceable, but there is no doubt that the parties have acted upon the tacit contract and understanding and recognized its terms in practice. In other words, the discrimination practiced by the Railroad has been fortified by the collective bargaining process. Under this heading the Railroad makes another effort to distinguish the *Tunstall* and *Steele* cases. The distinction relied upon this time is that in those cases there was collective bargaining actively destructive of existing accrued rights, whereas in the case at bar the relief is sought with respect to the future. This, as we shall show under another heading, is not the case.

The last argument under this heading is that even if there were such a verbal understanding for the perpetuation of a discriminatory practice as is alleged it would not be unlawful. The reason is that in the *Steele* and *Tunstall* cases there was already a discriminatory practice, namely, that negro firemen were not promotable to the post of engineer although white firemen were, and because the Court failed to criticize this contract this Court will similarly close its eyes to the alleged verbal understanding for the perpetuation of discrimination.

We have already remarked, and we repeat, that no matter what the Court did in the *Steele* and *Tun-*

stall cases, it was not at any time asked to pass upon the validity of the discrimination expressed in collective bargaining agreements made between the collective bargaining agent and the Railroad to the effect that negro firemen were not promotable. Had that question been raised, the Court which held that the collective bargaining agent had no power to discriminate against any of those it represented, could not have failed to condemn a contract arising out of the collective bargaining process which stigmatized the negro firemen as non-promotable solely because they were negroes.

The argument is fallacious. It proceeds upon the mistaken assumption that a collective bargaining agreement which characterizes some of the employees within its scope as non-promotable solely because of race is valid, whereas in truth such an agreement violates every principle established by the *Steele* and *Tunstall* cases.

The argument then proceeds upon the theory that if the original agreement barring negroes from promotion in the *Steele* and *Tunstall* cases is valid then the verbal agreement perpetuating the discriminatory practice of Railroad is likewise valid. The vice, however, lies in the major assumption that the original contract in the *Steele* and *Tunstall* cases was valid, a conclusion based exclusively upon the fact that it was not attacked.

The reason for the failure to attack is obvious. The original contract, discriminatory as it was, had en-

abled the non-promotable negro firemen to build up seniority and it was to protect these accrued seniority rights that litigation ensued resulting in the declaration that the subsequent contracts negotiated through the collective bargaining process which deprived the negro firemen of their accrued seniority, were invalid.

The final argument is that there is

NO JUSTICIABLE CONTROVERSY.

This argument is based upon the alleged fact that the relief sought is in the future. An examination of the prayer in the original complaint (Tr. 9 and 10) and in the proposed amended complaint (Tr. 158-160) shows that all relief sought is retroactive.

It is said that to accord seniority dates to the appellants in the manner demanded would adversely affect seniority rights of white cooks and other colored cooks who hold older seniority rights in Group A than the appellants. This is tantamount to saying that because the recognition of the rights of the appellants will adversely affect others who have benefited from the discrimination practiced against the appellants, the latter can have no relief. It is claimed that this is rewriting the contract. This is a familiar cry whenever it is sought to remedy an injustice that will adversely affect others who have benefited by it.

What has happened up to date is that the appellants have as a result of the collective bargaining process been discriminated against with respect to the acquisition of seniority in higher groups and classes than those to which they were assigned sen-

iority dates when first employed, and this solely upon the ground that they were negroes.

There could be no possible objection to classifying employees with respect to their fitness, capacity, skill or previous experience, and seniority dates assigned with reference to these considerations would be beyond any attack. If Railroad can, with respect to these specific considerations, independently of race, justify the seniority dates originally assigned to any of the appellants there is no discrimination, but if seniority dates were assigned discriminatorily and to the prejudice of appellants, the fact that there will be difficulties in adjusting their rights if they prevail is no sound argument against the recognition of the wrong which has been done them.

CONCLUSION.

In bringing to a close the reply to Railroad we wish to point out that in our opinion the fundamental weakness of its entire position is the unqualified assumption that the Railway Labor Act is not a Fair Employment Practices Act. Literally, this is true but when the collective bargaining agent by virtue of the collective bargaining process establishes, sanctions or perpetuates discrimination against any of those it is supposed to represent such discrimination cannot be justified.

Several times in Railroad's brief it has said in effect that independently of the collective bargaining

agent it could discriminate against negroes to any extent it desired and that what it can do alone it can do equally well with the cooperation of the collective bargaining agent. If this be true, then the *Steele* and *Tunstall* cases have been robbed of all significance, but until those cases are reversed, this position of Railroad is entirely fallacious, not to say disingenuous.

REPLY TO UNION'S BRIEF.

Most of the points made in Union's brief have already been fully discussed and it only remains to deal with a few matters which apparently are peculiar to Union's brief.

At the outset it is alleged that the appellant Hayes was the only party plaintiff below (Br. p. 1) and reference is made to pages 15 and 16 of the brief for further discussion of the point under the title "The parties."

In view of the momentous issues raised by this litigation, this question about parties seems quite puerile. The original complaint (Tr. 2-11) bore only the name of Thomas E. Hayes as plaintiff in the caption. But attached to the complaint was an Exhibit A listing the names of a large number of other individuals who in the first paragraph of complaint (Tr. 2) were described as plaintiffs. The filing of this complaint was the opening gun in this litigation. It would have been perfectly proper and lawful without recourse to any Court to have included the names of all of those

listed in Exhibit A of the complaint in the caption as plaintiffs, but whether listed in the caption or identified in the complaint as parties plaintiff, they became such without further ado. However, respondent saw fit to attack the complaint upon the theory that there was only one party interested, namely, Hayes. So to avoid argument the complaint was amended by incorporating all of the names in Exhibit A in the caption. This maneuver was attacked as an effort to accomplish intervention without complying with F.R.C.P. The issue was never passed upon and it had been our position from the start that the plaintiffs in the action and the appellants here are those who were named in the original complaint, either in the caption or in Exhibit A.

A second amendment to the complaint was filed merely to add new plaintiffs upon the theory that there had been no responsive pleading submitted by either of the defendants and, therefore, it was not necessary to obtain leave of Court to amend the complaint. In this we were apparently mistaken because there are one or two lower Court decisions holding that an amendment to add new parties is in effect intervention and must be accomplished in accordance with F.R.C.P. However, the point is, as we say, puerile as compared with the magnitude of the issues raised by the litigation and we shall not discuss it further. The only amendments to the complaint, other than the proposed amended complaint submitted after decision of the Court below were these two amendments to straighten out the question of the parties.

Certain it is that if the judgment of the Court below is reversed by this Court no substantial difficulty is anticipated with respect to the question of the parties.

The next point which is peculiar to Union's brief is the following: Emphasis is placed upon the allegation of the proposed amended complaint that the written contract did not contain any standard for determining the seniority group and class of new employees and this allegation is characterized as follows (Br. p. 13): "Reference is made to Rule 17(b) of the contract which is said to provide in plain terms that a new employee on the completion of the first ninety days of continuous service is to be accorded a seniority class and group in which such ninety days of continuous service is completed in all lower classes in that group and in all corresponding and lower grades in all lower groups."

This provision is said to be a standard for determining the seniority group and class of new employees. One question will expose the fallacy of the contention and that question is, who determines in what group or class the first ninety days of continuous service shall take place and upon what basis? Obviously, the contract gives no answer and the only answer is to be found in the discriminatory practice already sufficiently discussed.

The last point that we shall discuss is the terms of the judgment. (Br. 14.) As we have already said, the original judgment followed an opinion by the Court. (Tr. 136-144.) This was dated January 19, 1950. The next order was a minute Order dated Feb-

ruary 13, 1950 (Tr. 163) followed by a judgment of dismissal. (Tr. 164-165.)

Notwithstanding the clear statement of the Court in its opinion that the only issue considered was that of jurisdiction and that there was no reference in the opinion to the affidavits nor any reliance placed thereon, counsel for respondents deliberately prepared an Order of Dismissal that did not recite the facts, but on the contrary recited, "And it appearing to the Court after considering the complaint, the amendments thereto, the affidavits filed by the parties, and the statements of counsel that there is no genuine issue as to any material fact, and that the said defendants are entitled to judgment of dismissal."

Because of the fact that the judgment as prepared did not correspond to the Order of January 19 (Tr. 136-144), counsel refused to approve it as to form but merely acknowledged receipt of a copy. It can easily be seen that counsel was endeavoring to obtain in the Order rulings which had not been made by the Court.

CONCLUSION.

As was said in our opening brief, it is respectfully submitted that the original complaint was, notwithstanding the opinion of the Court below, sufficient to show jurisdiction in the Court and stated a claim upon which relief could have been granted, and that the only purpose of asking leave to file the amended

complaint was, first, to give the Court below an opportunity to reconsider its decision, and, secondly, to present the matter to this Court in the best possible form. Emphasis is placed by Union upon the fact that the complaint had been twice amended and a formal supplementary complaint had been filed. The two amendments were first, incorporating in the caption the names which were originally found in Exhibit A of the original complaint, and second, adding a few new parties. The supplemental complaint is not in the transcript and has no bearing on the situation. One would gather, however, from the emphasis placed upon the amendments that counsel had been attempting to amend the complaint in substance. This is not true, and the only attempt of that character is to be found in the proposed amended complaint.

We submit, therefore, the judgment of the Court below should be reversed and the cause remanded for further proceedings.

Dated, San Francisco, California,
July 26, 1950.

Respectfully submitted,
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